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April 10, 2008

DEPARTMENT OF ENERGY  
OFFICE OF HEARINGS AND APPEALS

**Hearing Officer's Decision**

Name of Case: Personnel Security Hearing

Date of Filing: November 27, 2007

Case Number: TSO-0572

This Decision concerns the eligibility of XXX X. XXXXX (hereinafter referred to as "the Individual") to hold an access authorization under the Department of Energy's (DOE) regulations set forth at 10 C.F.R. Part 710, Subpart A, entitled, "General Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." As discussed below, after carefully considering the record before me in light of the relevant regulations, I have determined that the Individual's access authorization should not be granted.

**I. BACKGROUND**

On August 17, 2006, the Individual provided a urine specimen at the request of his former employer as part of a post-accident drug screening. The August 17, 2006, urine specimen was then transported to the Medtox Laboratory and subjected to an immunoassay screening test. The immunoassay screening test performed by Medtox indicated the presence of a marijuana metabolite. The August 17, 2006, specimen was then subjected to a confirmatory test using the Gas Chromatography/Mass Spectrometry analytical method. The confirmatory test performed by Medtox was positive. Exhibit B. On August 19, 2006, the results of this positive drug test were reported to the Individual. Exhibit 9 at 15. The Individual asserted that he had not used marijuana since 1982 and provided a second urine sample on August 22, 2006. Exhibit 5. The August 22, 2006, urine sample was tested and found to be free of marijuana metabolites. Exhibit 5. On August 25, 2006, the former employer's medical officer requested a retest of the August 17, 2006, urine sample. Exhibit A. On September 20, 2006, Medtox subjected a split sample of the August 17, 2006, sample to a retest using the Gas Chromatography/Mass Spectrometry analytical method. On September 21, 2006, Medtox reported that the August 17, 2006, urine sample again tested positive for a marijuana metabolite. Exhibit B. In September 2006, the Individual's former employer terminated him for testing positive for marijuana.

On December 8, 2006, the Individual completed and signed a Questionnaire for National Security Position form (QNSP). Question 22 of the QNSP asked "Has any of the following happened to you in the last 7 years? 1. Fired from a job. 2. Quit a job after being told you'd be fired. 3. Left a job by mutual agreement following allegations of misconduct. 4. Left a job by

mutual agreement following allegations of unsatisfactory performance. 5. Left a job for other reasons under unfavorable circumstances.” Exhibit 8 at 31. The Individual checked the box labeled “yes” in response to this question. *Id.* The Individual listed his severance type as “left a job for other reasons under unfavorable circumstances.” *Id.* The Individual provided the following explanation:

I was injured on the job. Required by employer to take post accident drug screen; had positive post-accident drug screen result; I questioned results and lab; employer allowed appeal; I was allowed to retake drug screen which came back negative; employer denied appeal; left under unfavorable circumstances. . . . Will speak with investigator more in depth on circumstances if needed.

*Id.*

During the background investigation conducted by the Office of Personnel Management (OPM), the Individual informed an OPM investigator that he had been fired from his previous employer for testing positive for marijuana. Exhibit 10 at 25-26. The Individual stated to the OPM investigator that he had not used marijuana since 1982. *Id.*

On July 27, 2007, the DOE Office conducted a Personnel Security Interview (PSI) of the Individual.<sup>1</sup> During this PSI, the Individual reiterated his claim that he has not used marijuana since 1982. Exhibit 9 at 25. During this PSI, the Individual was asked whether he had informed his present employer about his positive marijuana test. The Individual maintained that he had informed his present employer that he had been terminated by his former employer for violating company policy and suggested that the interviewer contact his former employer. Exhibit 9 at 30-32. The Individual specifically stated that his present employer never asked him why he was fired. Exhibit 9 at 30.

On the basis of the positive urine test and the Individual’s statements that he had not used marijuana since 1982, the DOE Office determined that the Individual had used marijuana and then provided false information concerning his drug use to the LSO. Moreover, on the basis of the Individual’s statements during the PSI, the LSO concluded that the Individual had misled his present employer about the circumstances leading to his termination by his former employer. An administrative review proceeding was initiated. *See* 10 C.F.R. § 710.9. The DOE Office then issued a letter notifying the Individual that it possessed information that raised a substantial doubt concerning his eligibility for access authorization (the Notification Letter). The Notification Letter specifies three types of derogatory information described in 10 C.F.R. § 710.8(f), (k) and (l).

The Individual filed a Request for a Hearing, signed by both the Individual and his attorney. The Request for a Hearing asserted that the Individual “does not use marijuana, nor has he used marijuana in the past.” Request for Hearing at 1. The Request for Hearing also asserted that the Individual has been undergoing random drug tests for 20 years without any other positive results.

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<sup>1</sup> The transcript of the July 27, 2007, PSI appears in the record as Exhibit 9.

*Id.* The Request for Hearing further stated that the Individual requested that the August 17, 2006, sample be retested, but a retest of the August 17, 2006, sample was never conducted. *Id.* at 1, 3, 4. The Request for Hearing also states that the Individual was completely honest with the LSO during the investigation of his suitability for an access authorization. The Request for Hearing was forwarded to the Office of Hearings and Appeals (OHA) and I was appointed as Hearing Officer. At the hearing, the LSO presented no witnesses. The Individual testified on his own behalf. *See* Transcript of Hearing, Case No. TSO-0572 (hereinafter cited as “Tr.”). The LSO submitted 10 exhibits, marked as Exhibits 1 through 10, while the Individual submitted three exhibits, marked as Exhibits A through C.

## II. STANDARD OF REVIEW

The Hearing Officer's role in this proceeding is to evaluate the evidence presented by the agency and the Individual, and to render a decision based on that evidence. *See* 10 C.F.R. § 710.27(a). The regulations state that “[t]he decision as to access authorization is a comprehensive, common-sense judgment, made after consideration of all the relevant information, favorable or unfavorable, as to whether the granting of access authorization would not endanger the common defense and security and would be clearly consistent with the national interest.” 10 C.F.R. § 710.7(a). I have considered the following factors in rendering this opinion: the nature, extent, and seriousness of the conduct; the circumstances surrounding the conduct, including knowledgeable participation; the frequency and recency of the conduct; the Individual's age and maturity at the time of the conduct; the voluntariness of the Individual's participation; the absence or presence of rehabilitation or reformation and other pertinent behavioral changes; the motivation for the conduct, the potential for pressure, coercion, exploitation, or duress; the likelihood of continuation or recurrence; and other relevant and material factors. *See* 10 C.F.R. §§ 710.7(c), 710.27(a). The discussion below reflects my application of these factors to the testimony and exhibits presented by both sides in this case.

## III. ANALYSIS

### Criterion K

The Notification Letter alleges that the Individual has “[t]rafficked in, sold, transferred, possessed, used, or experimented with a drug or other substance listed in the Schedule of Controlled Substances established pursuant to section 202 of the Controlled Substances Act of 1970 (such as marijuana, . . . etc.). . . .” 10 C.F.R. § 710.8(k). The evidence supporting the LSO’s allegation that the Individual violated Criterion K is the Medtox Laboratory Report indicating that the August 17, 2006, urine specimen had tested positive for marijuana and had again tested positive when retested on September 20, 2006.

The use of an illegal drug, such as marijuana, raises questions about an individual’s reliability and trustworthiness, both because it may impair judgment and because it raises questions about a person’s ability or willingness to comply with laws, rules and regulations. *Revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information issued by the Assistant to the President for National Security Affairs, The White House (December 29, 2005)*

*(Adjudicative Guidelines) at 11 (Guideline H).*

At the hearing, the Individual testified that he had requested a second test of the August 17, 2006 urine sample. Tr. at 11-12. The Individual further testified that he had no knowledge that the retesting of the August 17, 2006, sample had been performed. The Individual testified that he provided a second urine sample the day after he received the results of the first test. *Id.* at 12, 15, 23. The Individual testified that the urine sample he provided on August 22, 2006, tested negative. *Id.* at 12. The Individual testified that he had provided several urine samples subsequent to August 2006 and they have all tested negative for drugs. *Id.* at 13-14. The Individual further testified that he has not smoked marijuana since high school. *Id.* at 14, 26, 27.

Drug testing is a valuable tool for ensuring that DOE facilities remain drug-free. When they are conducted, administered, analyzed and interpreted correctly, positive drug test results constitute highly probative and reliable evidence of illegal drug use. *See e.g., Personnel Security Hearing (Case No. TSO-0053)*, 28 DOE ¶ 82,943 at 86,418 (2003). The only evidence in the record indicating that the Individual's positive drug tests are not accurate are (1) the Individual's steadfast denials that he has not used marijuana since 1982, and (2) the urine specimen provided by the Individual on August 22, 2006 which tested negative.

After reviewing the evidence in the record, I find that the Individual has failed to provide convincing evidence to mitigate the DOE's Criterion K concern. I am not persuaded by the Individual's uncorroborated statements that he did not use marijuana since 1982 in light of a confirmed positive drug test in 2006.<sup>2</sup> Moreover, the fact that the Individual's urine tested negative on August 22, 2006, does not indicate that the Individual's urine did not contain a sufficient amount of marijuana metabolite to test positive on August 17, 2006.

## **Criterion F**

The Notification Letter alleges that the Individual has "deliberately misrepresented, falsified, or omitted significant information from . . . a personnel security interview, . . . in response to official inquiry on a matter that is relevant to a determination regarding eligibility for DOE access authorization, or proceedings conducted pursuant to § 710.20 through § 710.31." 10 C.F.R. § 710.8(f). Specifically, the Notification Letter alleges that the Individual, by stating that he had not used marijuana since 1982, during his July 27, 2007, PSI, violated Criterion F. The LSO also asserts that, during the PSI, the Individual "reported he was not completely honest with his current employer . . . regarding the reason his employment was terminated at his previous employer." Exhibit 1 at 1.

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<sup>2</sup> The Individual also asserted that he has been undergoing random drug tests for 20 years without any other positive results. However, the Individual did not submit any documentary evidence in support of this assertion.

False statements by an individual in the course of an official inquiry regarding a determination of eligibility for DOE access authorization raise serious issues of honesty, reliability, and trustworthiness. The DOE security program is based on trust, and when a security clearance holder breaches that trust, it is difficult to determine to what extent the individual can be trusted again in the future. *See e.g., Personnel Security Hearing (Case No. VSO-0281)*, 27 DOE ¶ 82,821 at 85,915 (1999), *aff'd*, 27 DOE ¶ 83,030 (2000) (terminated by OSA, 2000); *Personnel Security Hearing (Case No. VSO-0013)*, 25 DOE ¶ 82,752 at 85,515 (1995), 25 DOE ¶ 82,752 (1995) (affirmed by OSA, 1995).

As noted above, I have found that the probative value of the two positive tests of the August 17, 2006, urine sample outweighs any evidence in the record supporting an inference that the Individual had not used marijuana since 1982. In view of this finding, I must also conclude that the DOE has shown that the Individual provided false information in the PSI, as alleged. Accordingly, I find that the Individual has not mitigated the LSO's Criterion F concern on this matter.

However, I find that the record does not support the LSO's assertion that the Individual was not honest with his current employer about the reason his employment was terminated by his previous employer.<sup>3</sup> The only evidence the LSO cited in support of this assertion are pages 30-32 of the PSI transcript. In that PSI, the Individual was asked: "Did you let [your current employer] know you tested positive with [your previous employer]?" The Individual responded by stating "We talked about the fact that I was terminated and I asked them to contact [the previous employer]. I never attempted to hide it from them, they never asked me why I was terminated." Exhibit 9 at 30. This statement has apparently been misinterpreted by the LSO as a false or misleading statement. Therefore, this allegation does not provide an appropriate basis for invoking Criterion F.

## **Criterion L**

The Notification Letter alleges that the Individual has "[e]ngaged in any unusual conduct or is subject to any circumstances which tend to show that the individual is not honest, reliable, or trustworthy; or which furnishes reason to believe that the individual may be subject to pressure, coercion, exploitation, or duress which may cause the individual to act contrary to the best interests of the national security." 10 C.F.R. Section 710.8(l). Specifically, the Notification Letter notes that the Individual, by stating in the QNSP that he left the previous employer for "other reasons under unfavorable circumstances," rather than stating that he was terminated for violation of a company policy, was providing false or misleading information in his QNSP. However, the Individual's explanation was transparent and forthright. It unambiguously disclosed that he had been forced to leave his former employer because of a positive drug test.

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<sup>3</sup> Even if the LSO's assertion that the Individual was not completely honest with his current employer about the reason his employment was terminated at his previous employer were to be supported by the record, it is not properly considered under Criterion F, since the Individual's statements were not made during the course of an official inquiry regarding a determination of eligibility for DOE access authorization.

Therefore, it is clear that the Individual was not intending to mislead the LSO with this word choice.<sup>4</sup> Therefore, this allegation does not provide an appropriate basis for invoking Criterion L.

#### **IV. CONCLUSION**

For the reasons set forth above, I conclude that the LSO properly invoked Criteria K and F. With regard to Criterion L, however, the documentary and testimonial evidence convince me that the factual underpinnings of the allegations are incorrect. Therefore, I find that the Individual has mitigated the security concerns associated with Criterion L. However, as detailed in this decision, I found that the Individual has not mitigated the security concerns raised under Criterion K or the security concerns set forth under Criterion F. In the end, I find that the Individual has not demonstrated that granting his security clearance would not endanger the common defense and would be clearly consistent with the national interest. Accordingly, it is my opinion that the Individual's access authorization should not be granted at this time. The Individual may seek review of this Decision by an Appeal Panel under the procedures set forth at 10 C.F.R. § 710.28.

Steven L. Fine  
Hearing Officer  
Office of Hearings and Appeals

Date: April 10, 2008

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<sup>4</sup> However, the Individual's answer to question 22 of the QNSP implies that the Individual's positive drug test had been due to a mistake and therefore, if the drug test was accurate as the weight of evidence in the present proceeding indicates, was misleading in nature. This allegation does not appear in the Notification Letter under Criterion L.